No. 83-75

In the Supreme Court of the United States

OCTOBER TERM, 1983

GUILLERMO A. SAAVEDRA,
INDIVIDUALLY AND DOING BUSINESS AS
SAAGAN MOVING & STORAGE COMPANY, PETITIONER
v.
RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Wage-Hour Administrator properly construed the terms of petitioner's service contracts with the federal government according to the applicable provisions of the Service Contract Act, 41 U.S.C. 351(a)(2).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 1-18) is reported at 700 F.2d 496. The order and judgment of the district court is not reported. The opinion of the Wage-Hour Administrator (Pet. App. C-1 1-19) is reported at [Sept. 1978-Jan. 1981 Transfer Binder] Wages-Hour Administrative Rulings (CCH) para. 31,309. The opinion of the administrative law judge (Pet. App. C 1-40) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1983. A petition for rehearing was denied on April 15, 1983 (Pet. App. B 1). The petition for a writ of certiorari was filed on July 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Service Contract Act requires that every government contract in excess of $2,500, the principal purpose of which is to furnish services in the United States through the use of service employees, contain provisions assuring that the contractor's employees will receive the wages and fringe benefits generally prevailing in the contractor's locality. 41 U.S.C. 351(a)(1) and (2).[1] Pursuant to 41 U.S.C. 358, the Secretary of Labor is directed to make determinations of prevailing minimum wages and fringe benefits "as soon as it is administratively feasible to do so." The Administrator of the Wage-Hour Division within the Employment Standards Administration of the Department of Labor, to whom this responsibility has been delegated, issues wage determinations and revisions thereof on a periodic basis. See 29 C.F.R. 4.3.

Petitioner was awarded two government contracts to perform moving services in the San Francisco, California area (Pet. App. C 2). Contract "38" was awarded on June 20, 1975, for the term July 1, 1975, to June 20, 1976, and contained Wage Determination 66-190 (Rev. 9) (A.R. 469-496).[2] Contract "67" was awarded on June 7, 1976, for the term July 1, 1976, to June 30, 1977, and contained Wage Determination 66-190 (Rev. 11) (A.R. 501-527). Each wage determination contained minimum hourly rates of pay and

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[1]The goal of the Act is to prevent the government from awarding contracts to low bidders in circumstances where the low bids are based on the bidders' substandard levels of compensation. See *American Federation of Government Employees, Local 1668* v. *Dunn*, 561 F.2d 1310, 1312 (9th Cir. 1977).

[2]Wage Determination 66-190 covers San Francisco and San Mateo Counties in California. "Rev. 9" indicates that the wage determination had been revised nine times when contract "38" was awarded. ("A.R." refers to the certified administrative record filed with the district court and designated as part of the record on appeal.)

specified fringe benefits[3] for certain classes of employees (A.R. 486, 526-527). They also specified the minimum time an employee must work to qualify for each fringe benefit (Pet. App. A 10). It is uncontested that petitioner was not aware of his obligation to provide fringe benefits, and accordingly he did not do so (Pet. 43; Pet. Apps. A 3, C 13-14, C-1 7, 12).

2. Following an investigation by the Wage-Hour Division, the Deputy Solicitor of Labor filed an administrative complaint charging petitioner with failing to provide his employees prevailing fringe benefits, as set out in the wage determinations contained in contracts "38" and "67," in violation of the Service Contract Act, 41 U.S.C. 351(a)(2) (Pet. App. C 2; A.R. 1-5).

The administrative law judge held that petitioner was bound by and had violated the wage determinations set forth in his contracts, but that the amounts due from petitioner were less than the amounts requested in the administrative complaint (Pet. App. C 14-15, 37, 39-40). He concluded that the wage determinations in petitioner's contracts were ambiguous in two pertinent respects: whether the required monthly health and welfare payment in contract "38," which was poorly reproduced, was $88.35 or $38.35; and whether an employee's time spent on both federal and commercial work should be counted to establish the employee's entitlement to prevailing fringe benefits (Pet. App. C 15-20, 26-28, 34-35). Resolving both alleged ambiguities against the government, the ALJ concluded that the disputed figure could reasonably have been read as $38.35 and that only time spent on federal work should be counted toward eligibility for fringe benefits (Pet. App. C 16, 20, 26-28, 34-35). While ordering that the amounts due from

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[3]The fringe benefits included health and welfare payments, holiday pay, vacation pay and pensions (A.R. 486, 526).

petitioner be computed in accordance with his ruling, the ALJ also recommended that petitioner not be barred from receiving future federal contracts. See 41 U.S.C. 354; 29 C.F.R. 6.10(b).

3. Both parties sought review by the Wage-Hour Administrator. See 29 C.F.R. 6.11. The Administrator agreed that petitioner had violated the provisions of the Service Contract Act by not compensating his employees according to the wage determinations set forth in contracts "38" and "67." The Administrator reversed the ALJ's resolution of the alleged ambiguities in the contracts, however, because he agreed with the government that any ambiguity should not be interpreted adversely to petitioner's employees, the intended beneficiaries of the Act (Pet. App. C-1 1-19). Specifically, the Administrator held that an attentive reading of the wage determination showed that $88.35 was the correct health and welfare figure, and that, in any event, petitioner was not prejudiced by any imperfection in the printing because he neither relied on the suggested lower figure nor made any effort to clarify any patent ambiguity (*id.* at 3-8). In addition, the Administrator concluded that consideration of an employee's federal and commercial work in determining eligibility was reasonable and consistent with the Act and longstanding Department practice, as reflected by a 1970 opinion letter issued by the Wage-Hour Division and received into evidence in the case (*id.* at 8-15). Finally, the Administrator concurred in the ALJ's recommendation that petitioner not be barred from seeking future government contracts (*id.* at 18-19).[4]

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[4]Following the Administrator's decision, the case was remanded to the ALJ for computation of the amount of underpayments.

4. The district court upheld the Administrator's decision, and the court of appeals affirmed. The court of appeals held that the Administrator acted within his authority in reversing the ALJ's erroneous legal conclusions and those factual findings that he found to be clearly erroneous (Pet. App. A 4-7, 18). See 29 C.F.R. 6.14 (in reviewing the ALJ's decision, the Administrator should decide all questions of law and "shall set aside only those findings [of fact] that are clearly erroneous"). The court therefore upheld the Administrator's legal conclusion that the figure of $88.35 in contract "38" was not ambiguous. The court also noted that, even if the term were ambiguous, petitioner's suggested lower figure of $38.85 could not be accepted because it would establish "an illegal, subminimum health and welfare benefit" (Pet. App. A 14-15).

Similarly, the court of appeals sustained the Administrator's contract interpretation that an employee's federal and commercial time should be counted to establish the employee's eligibility for fringe benefits (Pet. App. A 10-14). The court concluded that the opinion letter introduced into evidence before the ALJ supported the Administrator's construction because it "parallels the Department's published methods, which count commercial time in computing eligibility for annual vacation benefits. 29 C.F.R. 4.171" (Pet. App. A 13; citation omitted). In rejecting petitioner's argument that the Administrator should have ignored the opinion letter because it was unpublished, the court observed that "[t]he administrator was not obliged to rule for Saavedra simply because the policy was unpublished. * * * Courts accord deference to an agency's reasonable and conforming interpretation of its own regulation" (*id.* at 12-13; citation omitted).

ARGUMENT

The court of appeals correctly sustained the Administrator's reasonable and well-supported construction of the wage determinations contained in the government's service contracts with petitioner. The court's resolution of the straightforward questions of contract interpretation raised by petitioner does not conflict with any decision of this Court or any other court of appeals and consequently does not warrant further review.

1. Petitioner's primary argument before this Court, as in the court of appeals, is that the Administrator improperly rejected the rule of *contra proferentem* (Pet. 43-50) and erroneously relied on an opinion letter manifesting the Department of Labor's longstanding position on the issue of computing eligibility for fringe benefits (Pet. 50-60). Neither contention is correct.

a. The general maxim that a contract should be construed against the drafter (*contra proferentem*) has been applied in the context of government contracts. See *United States* v. *Seckinger*, 397 U.S. 203, 210-216 (1970). But this rule does not override the controlling rule of construction that contractual provisions affecting the public interest, like the ones at issue here, must be construed in the manner most favorable to the public. See *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 470-471 (1960); *Joy* v. *St. Louis*, 138 U.S. 1, 38, 47 (1891); *Restatement (Second) of Contracts* § 207 (1979); 4 Williston, *Contracts* § 626 (3d ed. 1961); 3 Corbin, *Contracts* § 550 (1960). Service Contract Act provisions establishing minimum wage and fringe benefit standards are designed to protect employees of federal service contractors. *Masters* v. *Maryland Management Co.*, 493 F.2d 1329, 1332 (4th Cir. 1974).[5] Thus, the court of appeals

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[5]The Service Contract Act, moreover, like other labor standards statutes, is remedial legislation and must be construed to effectuate its remedial purpose. *Midwest Maintenance & Construction Co.* v.

correctly construed these agreements in a manner designed to protect the employee-beneficiaries of the contracts. The *contra proferentem* rule espoused by petitioner simply cannot govern where overriding interests of persons other than the two parties to the contract are at stake.

In any event, even if the *contra proferentem* rule were applicable, a contract ambiguity is resolved against the drafter only where the other party has actually relied on his interpretation of the contract. *Troup Bros., Inc.* v. *United States*, 643 F.2d 719, 724 (Ct. Cl. 1980); *Framlau Corp.* v. *United States*, 568 F.2d 687, 693 (Ct. Cl. 1977). This prerequisite has not been met in this case because petitioner was "unaware that the contract required him to pay employees a health and welfare benefit or any of the other fringe benefits prov[ided] in the wage determination" (Pet. App. C-17).[6] As a result, petitioner certainly did not rely on his *post hoc* interpretation of how to determine eligibility for those fringe benefits. For this reason alone, petitioner cannot now take advantage of any alleged ambiguity in the contract.

Vela, 621 F.2d 1046, 1050 (10th Cir. 1980). Cf. *Mitchell* v. *Lublin, McGaughy and Associates*, 358 U.S. 207, 211 (Fair Labor Standards Act, 29 U.S.C. (& Supp. V) 201 *et seq.*); *United States* v. *Davison Fuel and Dock Co.*, 371 F.2d 705, 709 (4th Cir. 1967) (Walsh-Healey Act, 41 U.S.C. 35 *et seq.*); *Drivers, Salesmen, etc., Local Union No. 695* v. *NLRB*, 361 F.2d 547, 553 n.23 (D.C. Cir. 1966) (Davis-Bacon Act, 40 U.S.C. 276a *et seq.*); *Walling* v. *Patton-Tulley Transp. Co.*, 134 F.2d 945, 949 (6th Cir. 1943) ("Eight-Hour Law," 40 U.S.C. (1958 ed.) 321 *et seq.*). See generally *Peyton* v. *Rowe*, 391 U.S. 54, 65 (1968).

[6]The fact that petitioner calculated his wage liability by relying on an irrelevant set of figures in a different part of contract "38," rather than on the wage determination itself (Pet. 43-44; Pet. Apps. A 3, C 13), obviously does not constitute reliance on his litigation-inspired interpretation of the fringe benefit provisions of the wage determinations for purposes of *contra proferentem*.

b. The Administrator's longstanding position that both federal and commercial work must be counted to determine an employee's entitlement to the benefits secured by the Service Contract Act is entirely reasonable. Petitioner's view that only time spent on federal contract work can be counted to determine eligibility for prevailing fringe benefits is therefore without merit.[7]

As the court of appeals noted (Pet. App. A 13), the Department's interpretive regulations, which are intended to serve as illustrations of the Administrator's construction of the Act (29 C.F.R. 4.101), indicate that commercial time should be counted in computing eligibility for annual vacation benefits. 29 C.F.R. 4.171(b)(2). The same rule logically applies to other fringe benefits under the Act.

The Administrator's interpretation also is consistent with the underlying purpose of the Service Contract Act: to assure that employees of federal contractors receive the benefits generally prevailing in their locality. 41 U.S.C. 351. A wage determination under the Act is intended to reflect the practice of local employers, who presumably determine eligibility of their employees for fringe benefits on the basis of all employment with the employer. Eligibility for prevailing fringe benefits should likewise be based on all employment with the contractor. Petitioner's interpretation, on the other hand, would permit contractors to shift employees from federal to commercial work in order to keep any individual employee from spending sufficient time on federal work to qualify for prevailing benefits.[8]

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[7]Once eligibility is established, the benefits required under the Act are prorated to reflect only the percentage of time spent on federal contract work. The method of proration is not an issue before the Court (Pet. 52 n.9).

[8]It is noteworthy that the ALJ found that, when expressly set out in contract "67," the Administrator's interpretation of the eligibility provision was supported by the Act (Pet. App. C 29-31).

Finally, the Administrator's interpretation has been expressed in a Wage-Hour Division opinion letter entered into evidence below (A.R. 941-942). The Administrator and the court of appeals correctly looked to this opinion letter for guidance on the proper interpretation of the wage determinations. Indeed, the Court has stated that the Administrator's interpretations of another labor standards statute, the Fair Labor Standards Act, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). Accord, *Mabee* v. *White Plains Pub. Co.*, 327 U.S. 178, 182 (1946). Cf. *Endicott-Johnson Corp.* v. *Perkins*, 317 U.S. 501, 507 (1943) (Walsh-Healey Act); *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127 (1940) (Walsh-Healey Act).[9]

2. Contrary to petitioner's argument (Pet. 33-43), the Administrator did not err in setting aside a number of the ALJ's conclusions. See 29 C.F.R. 6.14. In construing the relevant provisions of petitioner's service contracts, the Administrator properly resolved all pertinent questions of law. See *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291 (1922) (construction of a written instrument is solely a question of law). Indeed, the Administrator did not overturn the ALJ's factual findings in any of the instances cited by petitioner as error (Pet. 37-40). The Administrator's conclusion, for example, that petitioner

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[9]As the court of appeals correctly recognized (Pet. App. A 12), an agency may implement longstanding administrative policy in an adjudication, even if the interpretation is unpublished. Cf. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202-203 (1947) (new administrative policy may be implemented through adjudication). Contrary to petitioner's submission (Pet. 50-60), therefore, it is the reasonableness of the interpretation, rather than the legal effect of the Wage-Hour opinion letter itself, that is at issue here.

did not rely on the fringe benefit provisions of the wage determinations set forth in his contracts was consistent with the ALJ's findings (Pet. Apps. C 13-14, C-1 7, 12), and is conceded by petitioner (Pet. 43). Moreover, the Administrator's determination that the required health and welfare payment was unambiguously $88.35 is a legal conclusion. See *United States* v. *Sacramento Municipal Utility District,* 652 F.2d 1341, 1343-1344 (9th Cir. 1981).[10] Finally, the Administrator's reliance on prior administrative adjudicative decisions is simply an application of the legal doctrine of stare decisis, and thus was clearly within his authority.

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[10]Even assuming that the health and welfare payment figure in contract "38" was ambiguous, the Administrator correctly held that $88.35 was the applicable amount. First, both the contract (A.R. 471-472) and regulations (29 C.F.R. 4.101) require contractors to seek clarification of any obvious ambiguity. It is well-settled that this requirement is an exception to the general rule that a contract be construed against the drafter. See *Newsom* v. *United States,* 676 F.2d 647, 649 (Ct. Cl. 1982). Furthermore, as discussed above, petitioner cannot now claim that the contract should be construed in his favor, since he did not allege that he ever relied on his belated interpretation of the benefit figure. And, in any event, as the court of appeals concluded (Pet. App. A 15), adoption of the $38.35 figure propounded by petitioner would violate a published wage determination and result "in an illegal, subminimum health and welfare benefit."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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